UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL ASSOCATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 160, Charged Party, and SSA TERMINALS, LLC, Charging Party, and INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 19 Intervenor.	Case No. 19-CD-238056

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 19'S POST-HEARING BRIEF

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I. INTRODUCTION

Mechanics represented by the International Longshore and Warehouse Union Local 19 ("ILWU") and employed by SSA Terminals LLC ("SSA") have been working productively at Terminal 5 in the Port of Seattle since August 2018. Between August 2018 and April 2019, they restored the long-dormant cranes and set up every mechanic shop so that the terminal would be ready to reopen after being non-operational for four years. In April 2019, Terminal 5 began receiving cargo. Since then, ILWU mechanics have continued to perform all of the maintenance and repair work, contributing to the smooth operation of the facility, which also employs ILWU longshore and marine clerk labor. The reopening of Terminal 5 is a critical piece of the master plan developed by the Northwest Seaport Alliance to attract more cargo and larger vessels to the combined Ports of Seattle and Tacoma. This Section 10(k) dispute concerns the assignment of maintenance and repair work (also called "mechanic work") at Terminal 5. SSA has always used ILWU mechanics to perform this work at Terminal 5. SSA reports that it has been happy with the work of the ILWU mechanics at Terminal 5 and is satisfied with its decision to assign them the work. Charged party International Association of Machinists ("IAM") asks the Board to undo this assignment. For the reasons explained, the Board should maintain the status quo.

II. STATEMENT OF FACTS

A. Procedural History.

On March 18, 2019, an IAM Business Representative sent a letter to SSA Chief Operating Officer Edward DeNike ("Mr. DeNike") threatening "economic action against SSA including picketing and striking" over SSA's assignment of maintenance and repair work at Terminal 5 to ILWU. (Tr. 29:4-30:7 [DeNike][1]; Employer Exhibit ("Er. Exh.") 1). On March 19, 2019, SSA filed the instant unfair labor practice charge, No. 19-CD-238056, against IAM for

[1] All citations to the transcript cite the testimony of Mr. DeNike unless otherwise indicated.

the purpose of obtaining a § 10(k) hearing and award. On April 15, 2019, ILWU moved to intervene and, on April 17, 2019, Region 19 granted ILWU's motion.

The parties stipulated that Region 19 found reasonable cause existed to believe there has been a violation of § 8(b)(4)(D) and agreed to a scheduled § 10(k) hearing. (Joint Exhibit 1 ("Exh. J-1"), ¶ 1). The parties stipulated that SSA is an employer engaged in commerce within the meanings of Sections 2(6) and 2(7) of the National Labor Relations Act ("NLRA"), and that IAM and ILWU are labor organizations within the meaning of Section 2(5). (Board Exhibit 2 ("Exh. Bd-2")). The parties have also stipulated that SSA is not failing to conform to an order or certification of the Board, that both IAM and ILWU claim the work in dispute, and that there is no agreed upon method for voluntary adjustment of the dispute. (*Id.*). The hearing on this matter took place on April 24 and 25, 2019 and June 6, 2019 at NLRB Region 19 in Seattle, Washington, before Hearing Officer Daniel Hickey.

IAM served subpoenas on SSA and non-party Pacific Maritime Association ("PMA"). SSA and PMA produced some documents, but objected to the production of confidential internal bargaining-related communications. The Hearing Officer found the outstanding documents "immaterial" and closed the record. Having found the issues moot, he declined to separately rule on SSA's and PMA's petitions to revoke the subpoenas or IAM's motion to enforce. *See* Order on Remaining Subpoena Issues, at 2-3 (Jun. 20, 2019).

B. Labor and Management Parties To This Action.

SSA is a corporation headquartered in Seattle, Washington. (Exh. J-1, ¶ 4). For over 50 years, SSA, its affiliates, and its predecessors have operated and managed marine terminals and provided stevedore services at various ports on the Puget Sound and on the West Coast. (*Id.* at ¶ 5). SSA is the largest marine terminal operator on the West Coast. (Tr. 58:22-23). SSA operates Terminal 5 in the Port of Seattle. (Tr. 14:16-21). It also operates Terminals 18 and 30

in Seattle, in addition to terminals in the Port of Tacoma and elsewhere. (Tr. 58:18-21; 59:12-17; 61:12-15; 113:5-6). SSA's minority business partner is Total Terminals, Inc. ("TTI"). (Tr. 116:10-13).

SSA, directly or through its predecessors, has been a member of the Pacific Maritime Association ("PMA") since the 1940s. (Exh. J-1, at ¶ 6). PMA is the multi-employer association and collective bargaining/labor relations representative for most waterfront employers on the West Coast, including SSA and TTI. (*See* Tr. 35:11-15). PMA, on behalf of itself and its member companies, negotiated the collective bargaining agreement under which ILWU mechanics perform the disputed work, the Pacific Coast Longshore Contract Document ("PCLCD"). (Exh. J-1, ¶ 9). This coastwide agreement covers all longshore work, including the subcategory involving maintenance and repair, which is also referred to as mechanic work. (*See id.*; *see also* Tr. 370:6-10).

ILWU serves as the certified collective bargaining representative of a single, coastwise bargaining unit consisting of approximately 25,000 longshore workers, longshore mechanics and marine clerks, employed in all West Coast ports by approximately 80 stevedore, marine terminal, and steamship line companies. (Exh. J-1, ¶ 7). In the Port of Seattle, longshore workers, including longshore mechanics, are represented by ILWU Local 19. (*See* Tr. 471:5-11).

Both IAM- and ILWU-represented mechanics perform maintenance and repair work for various employers at marine terminals on the West Coast. (Exh. J-1, ¶ 18). In the Northwest Seaport Alliance, which jointly operates the Ports of Seattle and Tacoma, the practice is mixed. In the Port of Seattle, IAM mechanics perform maintenance and repair work at Terminals 18, 25, and 30, while ILWU mechanics perform maintenance and repair work at Terminals 46, 91, and 5. (*Id.*). In the nearby, larger port of Tacoma and other Puget Sound facilities, ILWU represents a majority of the mechanics. (Tr. 262:1-14; Exh. J-1, ¶ 18). SSA itself employs ILWU

mechanics at Terminals 5 and 91 in Seattle and at SSA's terminals in Tacoma, Portland, San Diego and other smaller ports. (*See* Tr. 268-271). The vast majority of SSA's workforce coastwide (taking into account all categories of longshore and marine clerk labor, including mechanic labor) is represented by ILWU. (Tr. 273:10-17).

C. The Work In Dispute.

Terminal 5 is a marine terminal facility that receives vessels carrying cargo to and from the Port of Seattle. Currently, the facility receives one vessel per week operated by shipping company Matson Lines. (Tr. 468:9-14). The work in dispute is the maintenance and repair of ship-to-shore gantry cranes, top picks, UTRs, all truck and service vehicles, forklifts, chassis, containers, reefers and other stevedore cargo-handling equipment at Terminal 5. (Exh. J-1, ¶ 19; Exh. Bd-2, ¶ 6).

The assignment of maintenance and repair work at Terminal 5 is controlled by SSA. (Exh. J-1, ¶ 6). Currently, the mechanics at Terminal 5 work directly under PMA-member Pacific Crane Maintenance Company, LLC ("PCMC") – a marine terminal maintenance and repair contractor. Notwithstanding PCMC's involvement, the parties have stipulated that the mechanics at Terminal 5 are employees of SSA for purposes of this § 10(k) hearing because SSA assigns and controls the details of their work. (Exh. J-1, ¶ 6).

D. Port-Wide Reallocation of Work to Grow Capacity and Resulting Anticipated Job Losses for ILWU Unit.

The reopening of Terminal 5 is a component of the Northwest Seaport Alliance's Terminal 5 Modernization Project – part of a larger master plan developed to attract more and larger vessels to the combined Ports of Tacoma and Seattle. (*Id.* at ¶ 15). The project requires shifting work between terminals to grow the Port of Seattle's overall capacity and use its terminals most effectively given their locations. (*See* Tr. 116-117).

The Terminal 5 Modernization Project includes multiple components. One component is

the reopening of Terminal 5, which occurred in April 2019 following approximately eight months of work to prepare the terminal to begin receiving cargo after it had been non-operational for about four years. (*See* Tr. 111:6-112:20; Exh. J-1, ¶¶ 14-16). Another component is the closure of Terminal 46, which will occur around the end of July 2019. Terminal 46 is operated by TTI, which employs approximately forty-five ILWU mechanics who will be laid off when the facility closes. (Tr. 301:19-303:10). The majority had already received lay-off notices at the time of the hearing. (Tr. 116-117; 302:22-304:2). Vessels that previously called at Terminal 46 will be rerouted to Terminal 18. (Tr. 116-117). Some of the vessels previously calling at Terminal 18 will be rerouted to Terminal 30. (*Id.*). To make room for these new vessels at Terminal 30, the weekly vessel operated by Matson has already been moved from Terminal 30 to Terminal 5, where it began calling in April. (*Id.* at 116).

Under the Terminal 5 Modernization Plan, terminals employing IAM mechanics will see an increase in cargo and thus an increase in mechanic work. (*See* Tr. 312-313; 314:11-20). Terminals 18 and 30 employ mechanics represented by IAM. (Tr. 64:11-16; 113:5-13). SSA, which operates Terminals 18 and 30, anticipates hiring at least two more IAM mechanics as a result of the shifting of work to these facilities. (Tr. 314:21-315:3). Meanwhile, under the Terminal 5 Modernization Plan, the number of ILWU mechanics employed on a steady basis port-wide is expected to drop, with forty-five being laid off from Terminal 46 and only about fifteen being hired on a steady basis at Terminal 5. (Exh. J-1, ¶ 20; Tr. 302:22-304:2; 315:8-13).

E. <u>SSA's Assignment of Maintenance and Repair Work at Terminal 5 to ILWU.</u>

SSA leased Terminal 5 from the Northwest Seaport Alliance as part of the plan described above. On or around August 20, 2018, SSA began using ILWU mechanics to perform maintenance and repair work at Terminal 5 in order make the cranes operational and to prepare the facility to begin receiving cargo. (Tr. 287:7-12; Exh. J-1, ¶ 16). Although SSA also had an

agreement with IAM covering the work, SSA decided to assign the maintenance and repair work to ILWU in order to comply with the PCLCD. The first ILWU mechanics hired were Dustin Crabtree and Seth Gelinas, who worked at Terminal 5 starting in August 2018. (Tr. 127:11-21; 288:23-289:3; 292:25-293:3).

When deciding how to fill the mechanic positions at Terminal 5, SSA knew that the closure of Terminal 46 would provide a large pool of qualified ILWU mechanics from which to hire for steady positions at Terminal 5. (Tr. 130:22-132:8). But SSA did not want to deplete the Terminal 46 mechanic workforce employed by TTI (SSA's business partner) while Terminal 46 was still operating. Mr. DeNike explained:

> We knew that there were 46 mechanics sitting at terminal 46 which, within a matter of months, were going to lose their jobs. And we were trying to be fair to them, that we didn't want to hire outsiders and give them those jobs when they were working at TTI, with a company that was going to fold. They were going to lose their jobs, and we felt it was the right thing to do to wait – to hold those jobs for some of those people.

(*See* Tr. 141:19-142:7; *see also* 366:16-23). SSA needed a short-term solution to fill its need for mechanic labor at Terminal 5 until Terminal 46 closed in July 2019. (Tr. 301:8-302:21).

SSA and TTI both entered into short-term agreements with PMA-member PCMC to supply mechanic labor at both Terminals 5 and 46. PCMC became a direct employer of all of the mechanics at both terminals. PCMC also brought some additional mechanics from Southern California on a temporary basis to supplement the Terminal 46 existing workforce. (Tr. 130:22-132:8).

The combined Terminal 5/Terminal 46 mechanic workforce moves back and forth between Terminals 5 and 46 as needed depending on work volumes. (Tr. 308:6-20). SSA only has to pay for the labor when mechanics are working at Terminal 5. (*See id.*; *see also* Tr. 323:21-324:24). Mr. DeNike testified that he believes his arrangement with PCMC to be fair and reasonable, particularly because it is only a temporary measure in place until labor from

Terminal 46 becomes permanently available. (Tr. 322:17-323:20; 163:21-165:14).

As a result of its membership in PMA, SSA was able to take advantage of a travel program through which PMA has paid all of the associated costs of the travel and lodging for the mechanics PCMC brought from Southern California. (*See* Tr. 366:24-368:22). Gradually, since Terminal 5 opened in April, most of the Southern California mechanics have returned home. (Tr. 471:1-4). Currently, the combined Terminal 5/Terminal 46 mechanic workforce is made up almost entirely of ILWU mechanics from Seattle. (*See* Tr. 284:17-285:15; 313: 11-13).

In August 2019, the agreement between PCMC and SSA will terminate and SSA will directly hire about fifteen steady ILWU mechanics for Terminal 5. SSA will utilize the ILWU-PMA dispatch hall as needed to supplement as work volumes require. (Exh. J-1, ¶ 20, Tr. 307; 479:23-480:5).

Mr. DeNike testified that SSA has ILWU mechanics working in all of the different mechanic shops at Terminal 5. (Tr. 468:15-21). The terminal is operating smoothly, vessels are departing on schedule as needed and the ILWU mechanics are a key part of that operation. (Tr. 469:3-25). SSA is happy with the work being performed by ILWU mechanics in every shop. (Tr. 472:6-9 [Reefer Shop: Q: … you're happy with the work that these former TTI reefer mechanics are doing for you at terminal 5, correct? A: Yes.]; Tr. 472:10-15 [CEM Shop: Q: "… you're happy with their work, too, correct? A: Yes.]; Tr. 473:13-14 [Crane Shop: "Q: And you've been happy with their work? A: Yes."); *see also* Tr. 261:13-15 [testifying regarding the ILWU mechanics in Tacoma, "they're doing a great job…. we're very happy with them").

Mr. DeNike further testified that SSA is satisfied with its decision to assign the mechanic work at Terminal 5 to ILWU. (Tr. 381:12-18 [Q: … are you satisfied with the decision you made in that assignment [of the work at Terminal 5 to ILWU? A: Yes."]).

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III. ARGUMENT

Once it has been determined that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that the dispute is properly before the Board, the Board must decide which group of employees is entitled to the disputed work and make and award the work accordingly. *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320, 1322 (1961), *citing NLRB v. Radio & Television Broadcast Engineers Union Local 1212*, 364 U.S. 573, 585 (1961) ("*CBS*"). "The determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors in the particular case." *Machinists Lodge 160 (SSA Marine)*, 347 NLRB 549, 553 (2006), *citing Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410-1411 (1962). Among the factors relevant to determining which group of employees is entitled to the disputed work are: (1) applicable certifications and collective-bargaining agreements; (2) employer preference and past practice; (3) area and industry practice; (4) relative skills and experience; (5) job impact; and (6) economy and efficiency of operations. *Id.* These factors, taken as a whole, but particularly the Employer's current assignment, the applicable collective-bargaining agreement, and the job loss that would be suffered by ILWU compel awarding the work in dispute to longshore mechanics represented by ILWU.

A. In Section 10(k) Cases in This Industry, the Board Has Maintained the Status Quo.

The instant case is only the latest in a long-running series of disputes between ILWU and IAM regarding which union is entitled to perform certain maintenance and repair work at different marine terminal facilities on the West Coast. (*See* Tr. 84-86). Both ILWU and IAM have prevailed in such cases. *See, e.g.*, *Machinists Lodge 160 (Seattle Cruise Terminal)*, 357 NLRB 126 (2011) (awarding work at Terminal 91 in Seattle to ILWU and incorporating by reference its prior vacated decision in *Machinists Lodge 160 (Seattle Cruise Terminal)*, 355

NLRB 23 (2010)); *Machinists Lodge 160 (SSA Marine)*, 347 NLRB 549 (2006) (awarding maintenance work at SSA Marine in Everett, Washington to IAM); *Machinists District 190 (SSA Terminal)*, 344 NLRB 1018 (2005) (quashing section 10(k) notice in favor of ILWU).

In every one of these cases between ILWU and IAM decided under Section 10(k), the Board has endorsed the employer's assignment of the work and the maintenance of the status quo, recognizing that the employers are generally in the best position to assess the appropriate assignment in this complex and changing industry. For example, in *Seattle Cruise Terminal*, 357 NLRB 126, SSA assigned maintenance and repair work at Terminal 91 in Seattle to ILWU because of SSA's desire to comply with the PCLCD. *Id.* at 126 (citing to the reasons stated in the Board's 2010 decision in the same case at 355 NLRB 22, 26 (2010)). The Board endorsed SSA's decision, maintained the status quo and awarded the work to ILWU despite the fact that SSA's collective bargaining agreement with IAM also covered the work and that SSA's past practice favored IAM. 355 NLRB at 25-27.

Other cases are the same, with the Board maintaining the status quo and affirming the employer's assignment, whether to ILWU or IAM. *Machinists Lodge 160 (SSA Marine)*, 347 NLRB 549, 551-52 (2006) (affirming SSA's decision to assign maintenance and repair work at the Port of Everett to IAM despite the fact that the PCLCD also covered the work in dispute); *Int'l Ass'n of Machinists & Aerospace Workers, Dist. Lodge No. 160 (Sealand Serv., Inc.*), 322 NLRB 830, 835 (1997) (affirming employer's decision to assign gate inspection work to IAM); *ILWU Local 19 (West Coast Container Serv., Inc.)*, 266 NLRB 193, 197 (1983) (affirming employer's decision to assign drayage and transport of containers for repairs to IAM).

Section 10(k) Board cases involving disputes between ILWU and other unions over maintenance and repair work in the longshore industry have likewise awarded the work by maintaining the status quo and affirming the employer's assignment. *Int'l Bhd. of Elec. Workers*

Local 48 (ICTSI Oregon, Inc.), 358 NLRB 903, 907 (2012) (affirming the employer's assignment of the work to the Electrical Workers), *voided on other grounds by NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *Int'l Bhd. of Elec. Workers Local 48 (Kinder Morgan Terminals)*, 357 NLRB 2217, 2221 (2011) (affirming the employer's assignment of the work to the Electrical Workers).

The only Section 10(k) longshore mechanic case in which the Board declined to endorse the employer's assignment of the work was *Machinists District 190 (SSA Terminal)*, 344 NLRB 1018 (2005), where the Board found Section 10(k) inapplicable. In that case, the Board granted the motion to quash the notice of 10(k) hearing because the work had historically been performed by ILWU until SSA unilaterally reassigned it to IAM. Therefore, Section 10(k) did not empower the Board to resolve the dispute. *Id.* at 1020-21. Here, by contrast, no party has moved to quash the notice of 10(k) hearing and there is no dispute that Section 10(k) empowers the Board to award the work at issue. (Exh. J-1, ¶ 1). Therefore, the Board should follow its practice of maintaining the status quo and awarding the work according to the employer's assignment, which in this case is to the ILWU.

B. The Section 10(k) Factors Favor Maintaining the Status Quo in This Case and Awarding the Work in Dispute to ILWU-Represented Mechanics.

1. Both CBAs Cover the Work in Dispute and, Thus, Do Not Favor Changing the Status Quo.

Both collective bargaining agreements cover the work and, thus, this factor does not favor changing the status quo under which ILWU mechanics are performing the work. Each labor organization (IAM and the ILWU) has a collective bargaining agreement with SSA that covers the disputed work. (*See* Exh. J-1, ¶ 8). SSA's collective bargaining agreement with IAM states that IAM-represented employees will maintain and repair all equipment owned or leased by SSA in the Puget Sound area. (Exh. J-3, Article 5). SSA's collective bargaining agreement

with ILWU contains similar language entitling ILWU to the "maintenance and repair of containers of any kind and of chassis" and the "maintenance and repair of all stevedore cargo handling equipment." (Exh. J-4, §§ 1.7-1.71). This specifically includes the performance of this work at "new marine terminal facilities," which include "vacated facilities," such as Terminal 5 in Seattle. *Id.* § 1.731. Terminal 5 in Seattle was vacated for a period of time before it reopened in April 2019. (Tr. 61:16-17; Exh. J-1, ¶14).

To the extent IAM tries to challenge whether the PCLCD covers the work in dispute, IAM's argument should be rejected. When interpreting a collective bargaining agreement, the Board "'gives controlling weight to the contractual intent underlying the contractual language in question.'" *Knollwood Country Club*, 365 NLRB No. 22, 3 (2017) (quoting *Mining Specialists, Inc.*, 314 BNLRB 268, 268-69 (1994)). Here, the parties to the agreement agree that the intent of the parties was to require that the work in dispute be assigned to ILWU. (Tr. 223:6-23; 243:9-15; 372:8-15; 374:13-375:10; 507:7-13). Their understanding of their own agreement is dispositive.

To reject the parties' own understanding, as IAM asks the Board to do, would be contrary to the law. The law "encourag[es] the practice and procedure of collective bargaining" in an effort to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment." 29 U.S.C. § 151. Consistent with the law and the purposes of the Act, the Board must and does defer to the joint determinations of the parties as to the meaning of their agreement. *See Babcock & Wilcox Construction Co., Inc.*, 361 NLRB No. 132, *5 (2014); *see also United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

The Board addressed an almost identical issue in *ILWU (Howard Terminal)*, 147 NLRB 359, 366 (1964). The case concerned whether the operation of certain cranes should be assigned to workers represented by ILWU or the Operating Engineers under Section 10(k). In considering whether the PCLCD covered the work, the Board had to determine whether the cranes were "'new' equipment to be operated by longshoremen [under the PCLCD] or 'old' or existing equipment which may be operated by non-longshoremen" under the PCLCD. The Board found that, while "[t]here may be room for disagreement with respect to the meaning of the ILWU-PMA agreement," the undisputed understanding of the parties was dispositive of the question. *Id.* Because the parties understood the cranes to be "new" equipment under their contract, the contractual right to the work was established and thus the cranes had "to be operated by longshoremen." Based on this evidence, the Board concluded that the PCLCD covered the work in dispute and ultimately awarded the work to ILWU. *Id.* at 366-67. The same result is warranted here.

Because both collective bargaining agreements cover the work, the factor does not favor taking the work away from ILWU and awarding it to IAM.

2. SSA's Exclusive Assignment of the Work to ILWU and Decision to Maintain that Assignment in the Face of Picketing Threats by IAM and the Clear Industry Preference for ILWU Weigh Heavily in Favor of Maintaining the Status Quo.

"'[I]t is well established that the fact of employer preference is entitled to "substantial weight.'" *Laborers Dist. Council of Ohio, Local 265 (AMS Constr., Inc.)*, 356 NLRB 306, 310 (2010) (quoting *Iron Workers Local 1 (Goebel Forming)*, 340 NLRB 1158, 1163 (2003)). The Employer's preference for one workforce or the other is shown in its actions in assigning the work, in addition to any testimony about the employer's stated preference if offered. *E.g.*, *Laborers Local 265 (AMS Construction)*, 356 NLRB 306, 310 (2010) (considering employer's stated preference and current assignment of work in dispute to evaluate factor); *In re Int'l Union*

of Operating Engineers, 337 NLRB 651, 653 (2002) (employer preference shown by employer's assignment of work to one workforce and refusal to reassign it); *Millwright-Technical Engineers*, 259 NLRB 128, 131 (1981) (employer preference shown by exclusive assignment and maintenance of such assignment); *Inland Boatmen's Union*, 227 NLRB 713, 716 (1977) (employer preference established by assignment and the employer's testimony of its satisfaction with the subsequent performance of the work); *Graphic Commc'ns Int'l Union Local 79L (Butterick Co.)*, 301 NLRB 195, 198 (1991) (employer preference established in part by the employer's decision to assign them to work).

Although frequently provided, testimony from the employer about its stated preference is not required and will not trump evidence of the employer's actions in assigning the work. *E.g., id.*; *Steelworkers Local 3-U (Greyhound Exposition)*, 302 NLRB 416, 420 & fn. 8 (1991) (declining to give substantial weight to the employer's testimony as to its preference because it was inconsistent with the employer's current assignment of the work). For example, in *International Union of Operating Engineers*, the employer failed to "expressly state a preference" in its testimony. However, because the employer assigned the work to the Elevator Constructors and refused to reassign the work despite threats from the other workforce, the Board found that the employer preference factor favored the Elevator Constructors. 337 NLRB 651, 653 (2002).

Here, SSA assigned the work to the ILWU from the outset, despite also having an agreement with IAM that covered the work. SSA stood by its decision to assign the work to ILWU and refused to reassign the work to IAM despite IAM's threats to picket. (Tr. 342-343; 29:4-30:7; Er. Exh. 1). At the hearing, Mr. DeNike defended SSA's decision. (Tr. 110:5-21; 343:3-7; 489:4-20). Mr. DeNike testified that he was satisfied with the work performed by ILWU and with his decision to assign the work to ILWU. (Tr. 288:17-22; 381:8-18; 468:22-

4:69:2; 489:8-20). He further testified that he did not intend to change his decision and did not intend to reassign the work to IAM. (Tr. 343:3-7 [Q: And do you have any intention of changing that assignment? A. No."]). Thus, the employer's preference is shown and the factor favors exclusively ILWU. *E.g., Int'l Union of Operating Eng'rs*, 337 NLRB at 653; *Int'l Union of Elevator Constructors, Local 3 (Otis Elevator Co.)*, 364 NLRB No. 131, 5 (2016) (evidence that "Otis assigned the disputed work to Mid America's unrepresented employees," "was satisfied with the work quality" and "used Mid America or one of its competitors to do" all of the disputed work showed Otis' preference for the unrepresented employees). As Mr. DeNike's testimony shows, his refusal to testify to a "preference" for one union or the other when asked by the Hearing Officer reflects his wish to avoid upsetting either union given his ongoing relationships with both. (Tr. 384:6-21). But his discomfort in answering the "preference question" does not undermine the company's undeniable and unwavering expression of preference in assigning the work to ILWU only.

IAM will argue that the Board should second-guess SSA's assignment of the work by examining SSA's reasons for its decision. "[T]he Board does not generally examine the reasons for an employer's preference unless there is evidence that the employer was coerced." *Operating Engineers Local Union No. 3 (Central Concrete Supply, Inc.)* 355 NLRB 1233, 1235 (2010) (refusing to examine the employer's reasons for assigning work to one workforce and not the other) (citation omitted); *accord Laborers Dist. Council of Ohio, Local 265 (AMS Constr., Inc.)*, 356 NLRB 306, 310 (2010) ("[T]he Board does not generally examine the reasons for an employer's preference unless there is evidence that the employer was coerced."); *Laborers Local 829 (Mississippi Lime Co.)*, 335 NLRB 1358, 1360 fn. 5 (2001) ("The Board does not generally examine the reasons for an employer's preference unless there is evidence that the employer was coerced into its preference. While the Steelworkers have questioned the reasons offered by the

Employer for its preference, there is no claim, or evidence, that the Employer's preference was not reflective of a free and unencumbered choice."); *see also Int'l Longshoremen's Local No. 50,* 223 NLRB 1034, 1037 (1976) (examining the basis for the employer's preference when the evidence shows it "changed only after Respondent's members engaged in a work stoppage").

Here, there is no evidence that SSA's decision to assign the work to ILWU was coerced or the product of anything other than SSA's free choice under the circumstances. Indeed, the only union to threaten coercive pressure against SSA in this case was IAM.

That SSA's collective bargaining agreement with ILWU motivated SSA's decision to assign the work to ILWU is lawful and appropriate. *Cf. Falkowski Grocery*, 236 NLRB 473, 475 (1978) (citing *Retail Assocs., Inc.*, 120 NLRB 388 (1958)) ("It is well established Board law that an employer who enters a multiemployer bargaining group is not free to examine the product of such negotiations to decide whether to accept those terms but must abide by the terms of that agreement negotiated on a group basis."). This is not evidence of coercion or evidence of the employer's consideration of an improper factor. *E.g., Graphic Communications Workers Local 508M (Jos. Berning Printing),* 331 NLRB 846, 848 (2000) (declining to assign substantial weight to the employer's preference based on its desire that the worker belong to "a stronger, better union" rather than traditional 10(k) factors). An employer's desire to comply with the agreement covering the majority of its workforce is lawful, proper and rational.

In any event, SSA's agreement with ILWU was not the sole motivation for its decision. Mr. DeNike explained that SSA was also motivated by the closure of Terminal 46, which would allow SSA to staff Terminal 5 with a portion of the former mechanic workforce of its business partner TTI. (*See* Tr. 141:19-142:7; *see also* 366:16-23). Access to an available and qualified workforce is another appropriate and lawful factor for an employer to consider. *See Dist. No. 15, Int'l Ass'n of Machinists & Aerospace Workers*, 326 NLRB 62, 67 (1998) (giving "great weight"

to the employer preference because based on traditional factors).

IAM may assert that SSA's relationship with PMA indicates that SSA's decision to assign the work to ILWU was somehow coerced. Relatedly, IAM may argue PMA's and SSA's failure to produce documents in response to IAM's subpoenas entitles IAM to an inference that PMA somehow forced SSA to comply with the PCLCD.[2] IAM tried and failed to make the identical argument in *International Association of Machinists & Aerospace Workers*, 355 NLRB 23 (2010) addressing maintenance and repair work for SSA at Terminal 91 also in the Port of Seattle. The Board's decision recounts:

> The IAM contends that the Board's usual practice of according considerable weight to an employer's preference is inappropriate here because the Employer provided no basis for its preference other than its commitment under the PMA's contract with the ILWU. Don Hursey, the IAM's business representative, testified that the PMA "forced" DeNike to say that he did not prefer the IAM anymore. Although DeNike never explicitly denied that he was pressured by the PMA, he testified that the term "forced may be a little heavy." The IAM argues that DeNike's testimony "[did] not in any way deny the thrust of the conversation—that [the Employer] was going to assign the disputed work to the ILWU not because of a free and rational choice … but because of some kind of outside pressure being placed upon it."

Id. at 26. The Board rejected IAM's argument. The Board held that, "[e]ven if the Employer's preference had been influenced by its obligations as a member of the PMA, that would not establish coercion or that its preference was somehow illegitimate." SSA's assignment of the work to ILWU in order to comply with the PCLCD "favor[ed] an award of the disputed work to employees represented by the ILWU." *Id.*

[2] Any adverse inference would also be improper for two independent reasons. First, an adverse inference is unwarranted and would be unduly prejudicial to ILWU. ILWU does not control SSA's or PMA's responses to subpoenas. Yet, the penalty of an adverse inference would be felt entirely by ILWU and not the entities that declined to comply with the subpoenas. In this Section 10(k) proceeding, PMA is a non-party and SSA is a neutral. *NLRB v. Radio & Television Broadcast Engineers Union Local 1212*, 364 U.S. 573, 581 (1961) (Sections 8(b)(4)(D) and 10(k) are intended "to protect employers from being the helpless victims of quarrels that do not concern them at all.") (quoting H.R.Rep.No. 245, 80th Cong., 1st Sess., p. 23 (1947)). The party adverse to IAM is ILWU. Second, no adverse inference is warranted or appropriate for withholding documents on the grounds that they are privileged or confidential. *E.g., Int'l Bhd. of Elec. Workers, Local Union No. 98 (Tri-M Grp., LLC)*, 350 NLRB 1104, 1107 n.12 (2007) ("Naturally, I draw no adverse inference from the failure to present testimony regarding privileged communications."); *see generally* Non-Party PMA's Position on the Remaining Subpoena Issues (Jun. 13, 2019) (explaining why the documents are privileged and the impropriety of an adverse inference under the circumstances).

Similarly, in *Operating Engineers Local Union No. 3 (Central Concrete Supply, Inc.)*, the "Operating Engineers contend[ed] that because the Employer assigned the disputed work to employees represented by Teamsters based on the Employer's perceived obligations under the ACA-Bay Area Teamsters contract, the Employer effectively expressed no preference for Teamsters." 355 NLRB 1233, 1234 (2010). The Board rejected this argument. Because there was "no evidence of coercion," the Board found that the employer preference factor favored awarding the work to the Teamsters as the employer had done. *Id.* at 1235.

Here too, the fact that SSA (whether on its own or with PMA's involvement) decided to assign the work to ILWU to comply with the PCLCD does not suggest that the decision was not free or rational. Nor was it SSA's only motivation.

The fact that the PMA-member companies as a group have a clear preference that the work be assigned to ILWU is also relevant and weighs heavily in favor of maintaining the assignment to ILWU. The Board has long recognized the "unmistakable" community of interest shared by PMA's employers:

> The ILWU's unit of longshoremen was found appropriate by the Board in 1938. At that time the Board recognized and accepted the fact that not all members of the Waterfront Associations, predecessors of PMA, directly employed longshoremen. Nevertheless, the Board was cognizant then, as it is now, **that employers in the shipping industry on the Pacific coast have a direct and vital interest in the terms and conditions of employment for longshoremen.** The history of labor relations in that industry has been fraught with extraordinary problems, which have extended beyond the customary employer-employee relationship. As the Board pointed out in 1938, the statute defines the term "employer" to include any person acting as an agent for an employer "directly or indirectly." All members of PMA have given that agency the authority to act as their agent and PMA, in turn, is clearly the agent of employers employing longshoremen. **In this particular industry the community of interest of the participating employers is unmistakable.**

Int'l Longshoremen's & Warehousemen's Union (Cal. Cartage Co., Inc.), 208 NLRB 994, 996–97 (1974), *amended by* 278 NLRB 220 (1986), *aff'd in part, rev'd in part sub nom. Cal. Cartage*

Co. v. NLRB, 822 F.2d 1203 (D.C. Cir. 1987) (acknowledging the Board's certification of an ILWU-represented collective bargaining unit almost 50 years prior and noting that "[t]he Board defined the unit so broadly because of the strength shown by the employers jointly negotiating and administering labor agreements through those associations).

In multiple cases arising from the first wave of mechanization in the shipping industry, the Board appropriately gave substantial weight to the interests of all PMA-member companies as an industry, in upholding new work assignments to ILWU. *See, e.g., Teamsters Local 85 (PMA)*, 208 NLRB 1011, 1015 (1974) ("These cases have arisen because of PMA's need to mechanize and improve the efficiency of its operations. Moreover, though containers are the focus of these disputes, the record convinces us that a meaningful inquiry into economy and efficiency cannot be limited to the precise operations involved in the disputes here. Because of the nature of the industry, and that of the employment relationship, it is not only the longshoreman who has an interest in the availability of longshore work, but also the Employer."); *UIW (Albin Stevedore Company)*, 162 NLRB 1005, 1011-1012 (1967) (agreeing "to view this dispute against the background of protracted negotiations" between PMA and ILWU to provide longshoremen the new work of operating cranes, previously operated by Operating Engineers, because containerization "will eliminate not only longshoremen formerly employed as crane and winch operators, but other traditional longshoremen classifications such as forklift drivers and swingman."); *ILWU (Howard Terminal)*, 147 NLRB 359, 366 (1964) (holding, "the automation concord set forth in the present agreement between the Respondents and the Employers is a most persuasive circumstance in this case .... to lighten the impact of unemployment problems created by automation" and compelling the conclusion that "longshoremen are entitled to perform the disputed work."); *ILWU Local 19 (Albin Stevedore Company)*, 144 NLRB 1443, 1448 (1963) (holding that "the larger automation concord between

Respondents and PMA far outweighed all other considerations.").

The industry preference in this case – for the ILWU-represented employees to be awarded the disputed work – is based on the following incontestable facts:

- The ILWU relationship under the PCLCD, which involves all United States west coast ports, involves far more employees and is greater in geographic scope and impact than the IAM relationship under the Local Lodge 289 collective bargaining agreement, which covers, simply, a relatively small union local, a single employer, and the Puget Sound area, (*Compare* Exh. J-4 (PCLCD sec. 1.1 [agreement covers work for all roughly 80 PMA-member companies at all ports in California, Washington and Oregon] *to* J-3 [IAM agreement Article 5 at p. 3 [agreement covers work by SSA in the Puget Sound]);
- The ILWU-represented employees are a single integrated workforce centered upon core longshore "production" employees who are crucial to ensuring that ship cargoes are discharged and loaded in a timely fashion, which is the central function of the entire maritime/port industry in the United States;
- Recognizing the integrated nature of the port operations and the importance of labor stability, the Board itself set up the ILWU-PMA bargaining unit at issue here, *Shipowners Ass'n of the Pac. Coast*, 7 NLRB 1002, 1022 (1938), petition for review *dismissed sub nom. AFL v. NLRB*, 103 F.2d 933 (D.C. Cir. 1939), *aff'd*, 308 U.S. 401 (1940);
- The economic impact of the longshore operations of the industry is both nationwide and immense. For example, according to statistics compiled and advertised to the public by PMA, (a) the PMA employer workforce moves a "total of nearly 17 million loaded container TEUs (twenty-foot equivalent units)" through West Coast ports each year; (b) the "West coast ports support an estimated 9.2 million U.S. jobs;" and (c) the "domestic

business impact of this trade is more than $2 trillion annually or 12.5 percent of the U.S. GDP." See IAM Exh. 9, PMA Annual Report 2018, p. 31 (specific quotes); and pp. 55-62 (breakdown of container tonnage and economic impact); *see also United States v. Pac. Mar. Ass'n*, 229 F. Supp. 2d 1008, 1010-11 (N.D. Cal. 2002) (detailing the significance of the West Coast ports to the U.S. economy based on sworn testimony from U.S. Sect't of Commerce Donald L. Evans);

- The industry's "global deal" in bargaining for all of the west coast ports to obtain the right to modernize – and thus necessarily diminish longshore work performed by the ILWU – was offset by, and in exchange for, the work preservation of maintenance and repair work for all new terminals, such as Terminal 5.

Thus, regardless of whether DeNike testified to SSA having a "preference" for ILWU, the industry-wide preference is for ILWU in this case. This preference reflects the "global deal" demonstrated and set forth in the PCLCD, which SSA rightly honored by assigning the work at Terminal 5 to ILWU.

SSA's decision to assign the work to ILWU and the industry's clear preference for ILWU in compliance with the industry-wide ILWU-PMA agreement weigh heavily in favor of continuing to assign the work to mechanics represented by ILWU.

3. Both IAM and ILWU Perform Similar Work at Other Terminals in the Puget Sound Area and at Other West Coast Ports and Thus, the Area and Industry Practice Does Not Favor Changing the Status Quo.

The parties have stipulated that (1) "[b]oth IAM and ILWU mechanics perform maintenance and repair work on the West Coast," (2) that IAM-represented mechanics perform maintenance and repair work at Terminals 18, 25, and 30 in Seattle, while ILWU-represented mechanics perform maintenance and repair work at Terminals 5, 46 and 91 in Seattle, and (3) that ILWU-represented mechanics perform the majority of maintenance and repair work in the

nearby, larger port of Tacoma and other Puget Sound facilities. (Exh. J-1, ¶ 18). As found in *Machinists District Lodge 160 (SSA Marine)*, 347 NLRB 549, 552 (2006), since both ILWU and IAM workers perform maintenance and repair work on waterfront terminals throughout the West Coast and in the Puget Sound, the factor of industry and area practice therefore does not favor changing the status quo, under which ILWU-represented mechanics perform the disputed work.

4. Both IAM and ILWU Mechanics Are Capable of Performing the Disputed Work and, Thus, the Skills Factor Does Not Favor Changing the Status Quo.

Both ILWU and IAM mechanics have the skills and abilities to perform the work in dispute. Mr. DeNike testified that ILWU-represented mechanics are qualified to perform the maintenance and repair work at Terminal 5. (*See* Tr. 131; 290:9-291:1; 302-304; 366). Indeed, Terminal 5 has been operating well with exclusively ILWU mechanics since August 2018.

The first ILWU mechanic hired by SSA at Terminal, Mr. Crabtree, has decades of experience and training as a crane mechanic in the longshore industry, including prior experience working on the cranes at Terminal 5. (*See* Tr. 602-606 [Crabtree]; 610-612 [Crabtree]; 292-293; 426:15-21). Specifically, Mr. Crabtree worked as a crane mechanic for twenty-three years (Tr. 605:6-7 [Crabtree]) and is trained in all aspects of crane maintenance and completed a four-year apprenticeship, through which he received training in welding, electrical and hydraulic work (Tr. 604:24-605:5 [Crabtree]; *see also* ILWU Exhibit ("Exh. I")-5). Mr. DeNike confirmed that Mr. Crabtree was qualified for this specific and difficult work, which cannot be said for all crane mechanics, including those represented by IAM. (Tr. 426:13-21).

Mr. Crabtree, along with Mr. Gelinas, were essential to the initial operations at Terminal 5. Mr. DeNike testified that they were responsible for bringing the four, previously long dormant, cranes at Terminal 5 back online, repairing the hydraulic system, crane electrical system, and PLC computer system on the cranes, and identifying for SSA a number of problems

with the cranes. (Tr. 293:23-296:21).

The second ILWU mechanic at Terminal 5, Mr. Gelinas, started working there in or about September 2018. (Tr. 612:2-8 [Crabtree]). Mr. Gelinas is also an experienced crane mechanic who had worked as a crane mechanic in other locations before coming to Terminal 5. (Tr. 293:7-22; Tr. 604:13-19 [Crabtree]; Tr. 292:25-293:12 [DeNike testifying that Mr. Gelinas had the required skills]).

In addition, there is no legitimate dispute that ILWU mechanics previously steadily employed at Terminal 46 performed the same types of work needed at Terminal 5. Indeed, many such ILWU mechanics are capably performing the disputed work at Terminal 5 today. Mr. DeNike confirmed that the ILWU Terminal 46 mechanic workforce is skilled and capable of continuing to perform the maintenance and repair work at Terminal 5 on a steady basis. (*See* Tr. 130:22-131:11; Tr. 302:22-304:15; 305:25-306:8).

IAM may attempt to tarnish Mr. Crabtree and Mr. Gelinas' contributions to Terminal 5 by suggesting that they took longer than necessary to bring the cranes back online, causing frustration for SSA. (*See* Tr. 157-158; 295-297; 393-395; 533-536 [Cook]; 577:25-578:25 [Silva]; 594:6-598:1 [Carroll]). However, there is no real dispute that neither Mr. Crabtree nor Mr. Gelinas was the cause of any delays SSA encountered at Terminal 5. (Tr. 296:15-297:2). Rather, the delays were due to mistakes by SSA management in misidentifying the magnitude of the work needed, as Mr. DeNike explained. (*See* Tr. 295-296). Mr. DeNike expressed his satisfaction with the work performed by ILWU mechanics, who were the ones to successfully identify and fix the problems. (Tr. 288:17-22; 381:16-18; 468:22-469:25; 489:14-20).

IAM also may try to claim that SSA encountered difficulty finding qualified steady mechanics from ILWU after hiring Mr. Crabtree and Mr. Gelinas. This is incorrect. SSA identified an ample number of qualified ILWU mechanics for Terminal 5 after conducting

interviews and even generated a list of those it found qualified. (Tr. 363:7-15 [DeNike correcting earlier misstatements], 364:6-365:16, 361:24-362:17; *see also* Exh. I-4 (list of sixteen ILWU mechanics deemed qualified to work at Terminal 5 prepared by SSA managers)). In order to avoid disrupting the operations of its business partner TTI, SSA then found more qualified ILWU mechanics through PCMC. (Tr. 366:6-23).

The factor of relative skills and training therefore does not favor changing the status quo, under which ILWU-represented mechanics are capably performing the disputed work.

5. Job Losses Faced Exclusively by ILWU Warrant Maintaining the Status Quo.

"The Board will consider job loss when making an award of the work in dispute." *Int'l Ass'n of Machinists (SSA Marine, Inc.),* 355 NLRB No. 3, *7 (2010) adopted by *Int'l Ass'n of Machinists (Seattle Cruise Terminals)*, 355 NLRB No. 24 (2011); *accord In Re Bakery Confectionery Tobacco Workers & Grain Millers Int'l*, 339 NLRB 1095, 1098 (2003) ("[T]he avoidance of potential layoffs and unnecessary disruption in the production unit is a valid consideration that favors awarding the work to employees represented by Local 205"); *Iron Workers Local 40 (Unique Rigging)*, 317 NLRB 231, 233 (1995) ("We find the potential adverse impact on the Employers' current employees favors an award of the work in dispute to those employees, who are represented by Steamfitters Local 638."); *Laborers Local 681 (Elmhurst-Chicago Stone Co.)*, 263 NLRB 980, 982-83 (1982) (job impact favored awarding work to group that would lose jobs if work were assigned to other group); *L.E. McGraw Constr.*, 283 NLRB 598, 600 (1987) ("The Employer testified that if an award of the disputed work is made to employees represented by the Laborers Union, the Employer will be forced to lay off four carpenters. Accordingly, we find that the factor of job impact favors the Employer's assignment.").

This factor weighs entirely in favor of ILWU. ILWU is losing approximately forty-five

steady mechanic jobs due to the closure of Terminal 46 as part of the Terminal 5 Modernization Plan. (Tr. 302:22-303:8, 477:12-16). SSA's use of ILWU mechanics at Terminal 5 helps to offset this job loss to some extent. (Tr. 474:18-25). Meanwhile, IAM will suffer no job losses. (Tr. 315:4-7; 312:15-20). Indeed, IAM is slated to gain mechanic jobs in Seattle even with the assignment of the Terminal 5 work to ILWU because of the shifting of cargo to Terminals 18 and 30, where IAM mechanics work. (*See* Tr. 313:6-8; 314:17-315:3).

Thus, the factor of job impact weighs entirely in favor of ILWU.

6. The Economy and Efficiency Factor Does Not Warrant Changing the Status Quo.

There are economies and efficiencies in using either workforce. Mr. DeNike testified that IAM generally is slightly less expensive than ILWU because ILWU mechanics work nine hours but are paid for ten hours. (Tr. 360:23-361:18; 217:24-219:9). Under the IAM contract, on the other hand, IAM mechanics work only eight hours and get paid straight time for those eight hours. (Tr. 218:10-12; 361:8-13). However, this difference is not at issue at Terminal 5. Mr. Crabtree explained that mechanics at Terminal 5 have worked around ten hours a day. (Tr. 633:20-634:1 [Crabtree]). Mr. DeNike also testified that if SSA were to assign the work to IAM's workforce, SSA might hire seven or eight steady mechanics, whereas SSA intends to hire fifteen steady ILWU mechanics. (Tr. 479:23-480:1; 481:11-23). However, there are other factors that have created efficiencies and economies for SSA in using ILWU mechanics at Terminal 5.

SSA's current use of ILWU mechanics allows SSA and PCMC to shift mechanics back and forth between Terminal 5 and Terminal 46 as needed. SSA only has to pay them when they are working at Terminal 5. This is more economical for SSA than having to maintain an IAM mechanic workforce at Terminal 5, no matter the size.

By using ILWU mechanics (and through its relationship with PCMC and PMA), SSA has

been able to obtain skilled mechanics from Southern California on a temporary basis without having to pay any of the associated costs of their travel. PMA has covered those costs through a travel fund. (Tr. 366:24-369:10; *see also* 199:16-18). Mr. DeNike explained that highly qualified crane mechanics are in short supply in the Seattle area in both the ILWU and IAM workforces. (Tr. 310:2-14). By using the ILWU workforce, SSA has gained top-flight mechanics from outside Seattle without having to pay for the associated travel expenses and without having to deplete the mechanic workforce of its business partner TTI or deplete its own IAM mechanic workforce at Terminals 18 and 30.

By using ILWU, SSA can hire steady mechanics from the pool of forty-five qualified, experienced ILWU mechanics who will soon find themselves out of work. (*See* Tr. 130:24-131:24; 303:23-304:11; 477:17-19). If SSA chose to assign the Terminal 5 work to IAM's workforce, IAM would have to either hire from outside the maritime industry or transfer a number of mechanics from either Terminal 18 or Terminal 30 and then backfill their positions, likely by having to hire from outside the maritime industry. (Tr. 332:14-24; 336:20-24). Either way, this would have a negative impact on SSA's operations. (*See* Tr. 332:14-24; 336:20-24). As Mr. DeNike explained, mechanics who do not have marine terminal experience are less qualified and SSA prefers not to hire them. (Tr. 339-340).

The availability of the ILWU-PMA dispatch hall under the PCLCD provides SSA with efficiencies that are not available under the IAM contract. (*See* Tr. 307-308). SSA expects to hire a steady crew of mechanics at Terminal 5. (Tr. 307:2-8; 479:23-480:1; Exh. J-1, ¶ 20). Whenever additional work is needed, SSA will hire mechanics from the ILWU-PMA dispatch hall on a daily basis. (Tr. 307:10-11; 480:2-5). Mr. DeNike stated that the availability of the dispatch hall under the PCLCD is a cost-saving measure for SSA because they can maintain a core group of steady mechanics, and then use the hall on an as-needed basis. (Tr. 307:24-308:5).

The ILWU mechanic workforce is also more versatile and works closely with the longshore workforce, which is represented by the same union under the same contract. ILWU mechanics are cross-trained in operating equipment and other longshore work. (*See* Tr. 350:18-351:10, 351:4-10). The IAM workforce, on the other hand, cannot operate equipment or perform other longshore work. When one group of employees is more versatile, the factor of efficiency favors awarding the work to that group. *Laborers (E&B Paving),* 340 NLRB 1256 (2003).

Section 1.811 of the PCLCD in particular provides SSA with certain efficiencies it would not have with an IAM workforce with regards to transporting equipment. (*See* Tr. 485-487; 490-491). Under section 1.811, an ILWU mechanic can move equipment from one location to another. (Tr. 485:6-486:2). Conversely, under the IAM contract, IAM mechanics cannot move equipment from one location to another; SSA must use ILWU workers. (Tr. 486:3-22). For example, ILWU mechanics can bring broken equipment to the mechanic shop for repairs, but they can also go to the container yard and do minor repairs on equipment themselves in that yard. (Tr. 490:3-14). IAM mechanics cannot move equipment to the mechanic shop to be repaired and cannot do onsite minor repairs in the container yard. (Tr. 490:19-25).

IAM presented testimony that IAM mechanics at Terminals 18 and 30 have moved broken-down equipment to the shop for repairs. (*See* Tr. 586:13-587:18 [Carroll]). If this practice indeed takes place, it should not affect the Board's analysis. As Mr. DeNike testified, SSA is obligated under the PCLCD to have ILWU gearmen move equipment from facilities to the shop for repairs, even if the facility is staffed by IAM mechanics. (Tr. 486-487). If IAM mechanics are indeed transporting equipment, this is a breach of the plain language of the PCLCD.

Noting the same elements of cross-training, job interchange and use of temporary employees through the joint ILWU-PMA dispatch halls, the Board has found these features of

the ILWU-PMA bargaining unit to warrant a finding of greater economy and efficiency in favor of ILWU-represented workers. *See, e.g., Teamsters Local 85 (PMA)*, 208 NLRB 1011, 1016 (1974) ("It is easier and more practical to attract and maintain a pool of longshoremen of the size necessary to perform the required work during peak periods and it reduces the amount of money the Employer may be required to pay out under the mechanization and modernization agreements between PMA and the ILWU. In short, it permits the Employer greater economy and the available and versatile workforce necessary to its operations. Similarly, the use of longshoremen to load and unload containers employs those who might otherwise receive pay under the guarantees without performing useful work.") (awarding the work of loading and unloading trucks at marine terminals to ILWU); *Teamsters Local 85 (PMA)*, 191 NLRB 493, 496 (1971) ("The familiarity and experience obtained as a longshoreman in the use of all types of gear is very helpful if not, in fact, necessary, to a gearman. In addition, a gearman must be able to operate the mechanical gear such as pay loaders and tractors used in longshore work since he is required to load and unload such mechanical gear from the gear trucks. If a gearman's services are not required by one of the PMA members, he can be dispatched as an ordinary longshoreman from the hiring hall.") (awarding the work of the gear truck driving to ILWU); *United Industrial Workers of North America ("UIW") (Albin Stevedore Company)*, 162 NLRB 1005, 1011 (1967) ("As noted, the evidence shows that longshoremen with hatchtending experience are capable of interchanging between the positions of hatchtender and hammerhead operator. Thus, the periodic interchange by longshoremen between the two positions would eliminate the need for a relief operator, and enable the operator to perform safer and more efficiently by virtue of his familiarity with the physical conditions aboard ship.") (awarding to ILWU longshoremen the operation of the hammerhead cranes that were previously performed by Operating Engineers).

Having longshore workers and mechanics in the same union also creates efficiencies because it is safer. Mechanics and traditional longshore workers such a crane drivers have to work closely together for the terminal to operate efficiently and safely. They communicate multiple times a day in the course of their work to make sure equipment is operating as it should. Break-downs in communication can have life-threatening consequences in this dangerous industry. (Tr. 640-643 [Harriage]). When the mechanics and longshoremen are represented by the same union, there are closer relationships and better communication, which allows the terminal to operate more smoothly and safely. (Tr. 644-646 [Harriage]).

The ILWU contract also provides SSA with the ability to have ILWU mechanics work back-to-back shifts at a lower cost, also known as "doubling." Mr. DeNike testified that SSA occasionally needs workers to do this to meet an urgent need. (Tr. 481:24-482:12). It is approximately thirty to forty percent more expensive to utilize the IAM workforce when doubling is needed. (Tr. 484:15-485:2). Under its contract with IAM, SSA can use IAM mechanics who work the first and second shifts on the third shift. (Tr. 483:5-484:12). The third shift works from 3 AM to 8 PM, otherwise known as the "hoot owl" shift. (*Id.*). Under the IAM contract, IAM mechanics can extend a couple hours from their second shift into the third shift, or the first shift can start early on the third shift. (*Id.*). This method means that there does not have to be a separate set of IAM mechanics to work the "hoot owl" or third shift. (*Id.*). Under this contract, SSA must pay the IAM mechanics double time. (*Id.*). The ILWU contract is different and ultimately the more economical choice for SSA. (*See* Tr. 484:21-485:2). When an ILWU mechanic doubles, SSA does not pay them overtime; rather, SSA pays them the standard shift rate. (Tr. 482:17-22). The ILWU contract does not allow extension of shifts, so SSA must order a specific third shift. (Tr. 484:13-24). Ultimately, "the double time for the IAM is more expensive than a third shift for the longshoremen." (*Id.*).

IAM will point to the approximately 10% increase in SSA's costs as a result of its decision to contract with PCMC to provide labor until August 2019. This added expense is short term and is a consequence of SSA's business decision to use a contractor in order to appease its business partner TTI. It is not reflective of the cost of the ILWU workforce as compared to the IAM workforce and should not factor into the analysis.

IAM will also point to the costs to PMA associated with temporarily transferring a number of PCMC mechanics from Southern California to Seattle. Again, as Mr. DeNike testified, it is PMA, and *not* SSA, that paid all of these expenses. (Tr. 196:10-12; 199:16-18). Thus, this aspect of the arrangement is a benefit to SSA, which pays no costs whatsoever. SSA is the only employer for the purposes of this jurisdictional dispute. (Exh. J-1, ¶ 6).

On balance, the factor of efficiency and economy is neutral. At worst, it weighs slightly in favor of IAM. Either way, the factor does not justify altering the status quo. Where, as here, an employer has continuously assigned the work to one union, evidence that economies or efficiencies weigh in favor of the other union do not justify changing the status quo. *Int'l Union of Operating Engineers, Local 150*, 364 NLRB No. 132, 5 (2016) ("After considering all of the relevant factors, we conclude that employees represented by Operating Engineers are entitled to perform the work in dispute. We reach this conclusion even though assigning the work to employees represented by Longshoremen would result in slightly greater economy and efficiency of operations. The Employer's preference and past practice of assigning loading and unloading work to Operating Engineers when performed with a lattice crane, which the material handler will functionally replace, however, conclusively favor assigning the work to employees represented by Operating Engineers."); *United Ass'n, Local 447 (Rudolph & Sletten, Inc.)*, 350 NLRB 276, 282 (2007) ("[E]mployees represented by the Carpenters are entitled to perform the work in dispute. Although the factors of relative skills and training and economy and efficiency

of operations slightly favor awarding the disputed work to a composite crew of employees represented by the Plumbers and the Electricians, we find that those factors are outweighed by the factors of Employer's preference, past practice, current assignment, and collective-bargaining agreement that favor awarding the disputed work to employees represented by the Carpenters.").

IV. CONCLUSION

SSA assigned the work to ILWU and has never wavered from that assignment, even in the face of IAM's threats of picketing. ILWU mechanics are capably performing the disputed work at Terminal 5 and have done so for almost a year. The undisputed evidence shows that ILWU will suffer significant job loss if the Board assigns the work to IAM, which suffers no job losses as a result of the work being assigned to ILWU. The factors of collective bargaining agreements, industry practice and relative skill levels are neutral. The factor of efficiency/ economy is also neutral. When all of the relevant factors are weighed, the Board should follow its standard practice and maintain the status quo by awarding the mechanic work at Terminal 5 to ILWU.

Dated: July 16, 2019

Respectfully Submitted,

By: /s/ Eleanor I. Morton
/s/ Elizabeth Medrano

Eleanor I. Morton
Elizabeth Medrano
LEONARD CARDER, LLP
1188 Franklin Street, Suite 201
San Francisco, CA 94109
Tel: (415) 771-6400
Fax: (415) 771-7010
emorton@leonardcarder.com
emedrano@leonardcarder.com

Attorneys for Intervenor
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 19

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA 94109. I hereby certify that on **July 16, 2019**, I caused the foregoing document(s):

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 19'S POST-HEARING BRIEF

to be filed electronically with the National Labor Relations Board, and a true and correct copy of the same was served on all interested parties in this action as follows:

Jim McMullen
GORDON REES SCULLY MANSUKHANI LLP
101 West Broadway, Ste. 2000
San Diego, CA 92101
jmcmullen@grsm.com

David Rosenfeld
WEINBERG ROGER & ROSENFELD PC
1001 Marina Village Pkwy., Ste. 200
Alameda, CA 94501
drosenfeld@unioncounsel.net

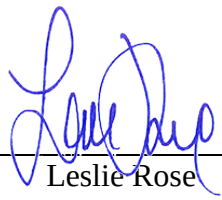
Regional Director Ronald K. Hooks
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2nd Ave., Room 2948
Seattle, WA 98174
ronald.hooks@nlrb.gov

Daniel M. Hickey
Senior Labor Management Relations Examiner
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2nd Ave., Room 2948
Seattle, WA 98174
daniel.hickey@nlrb.gov

☑ **BY E-MAIL:** I caused the documents to be sent to the person at the electronic notification address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **July 16, 2019**, at San Francisco, California.



Leslie Rose